Supreme Court, U.S.
FILED
AUG 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-277

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF FLORIDA,

Petitioner,

vs.

SETH EBER, ROBERT RIZZIERI, CHARLES DELMONICO, SHELDON SPECTOR and BURTON WOLCOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

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581P

QUESTION PRESENTED

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA DISREGARDED THE OPINION OF THIS COURT IN FRANKS v. DELAWARE, 438 U.S. 154, 98 S.CT. 2674, 57 L.ED.2D 667 (1978), ADOPTED BY FLORIDA IN ANTONE V. STATE, 382 SO.2D 1205 (FLA. 1980); CERT. DENIED, 449 U.S. 913; 101 S.CT. 287, 66 L.ED.2D 141 (1980) AND MANDATED BY ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION (1982).

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WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA DISREGARDED THE OPINION OF THIS COURT IN FRANKS V. DELAWARE, 438 U.S. 154, 98 S.CT. 2674, 57 L.ED.2D 667 (1978), ADOPTED BY FLORIDA IN ANTONE V. STATE, 382 SO.2D 1205 (FLA. 1980) CERT. DENIED, 449 U.S. 913; 101 S.CT. 287, 66 L.ED.2D 141 (1980) AND MANDATED BY ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION (1982).

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I.

OPINION BELOW

The opinion of the Florida Supreme Court declining conflict jurisdiction is not yet reported (A.1).[1]

The opinion of the Florida Third District Court of Appeal on Petitioner's direct appeal from the trial court order granting motions to suppress evidence from electronic surveillance is repored as State v. Eber, 502 So.2d 32 (Fla. 3d DCA 1984) (A.3).

The order of the trial court granting motions to suppress from electronic surveillance is unreported (A.18).

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[1] The symbol "A" is used to designate the appendix to this brief.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17 (c) of the Rules of the Supreme Court and 28 U.S.C. §1257(3). The opinion of the Florida Third District Court of Appeal was filed on January 20, 1987 (A.3). A timely filed Motion for Rehearing and Clarification was denied on February 25, 1987 (A.16). A timely filed Petition for Review to the Florida Supreme Court was denied on June 19, 1987 (A.1).

III

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The applicable provisions of the United States Constitution read as follows:

AMENDMENT IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The applicable provisions of the Constitution of the State of Florida read as follows:

ARTICLE I

SECTION 12. **Searches and seizures.** - The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or

information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The respondents were charged in the Circuit Court of Dade County, Florida with multiple charges relating to Extortion, Grand Theft and Dealing in Stolen Property.[2] The respondents filed a joint motion to suppress evidence obtained by electronic surveillance (A.18). The primary ground for the motion was alleged errors and omissions contained in the affidavits in support of the warrants concerned (A.26-31).

The trial court found that a number of errors and omissions, in affidavits concerning different warrants, were, when added together, material to the

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[2] The charging documents are multiple and somewhat lengthy and, therefore, are omitted from the appendix. Should this Court accept jurisdiction, they will be provided as a portion of the Record-on-Appeal.

establishment of probable cause and, therefore, required reversal under the standard of Hudson v. State, 368 So.2d 899 (Fla. 3d DCA 1979). This standard requires that the affidavits concerned be invalidated, ". . .if the errors in the affidavit were committed with intent to deceive the magistrate, whether or not the errors were material to a showing of probable cause, or if the errors were made nonintentionally, but the erroneous statements are material to the establishment of probable cause...." (A.26).

The Third District Court of Appeal reversed the trial court as to one (1) defendant, who was found not to have standing, but affirmed it as to all other defendants, implicity approving the trial court's order and the appli-

cation of the standard in Hudson v. State, 368 So.2d 899 (Fla. 3d DCA 1979).

The Petitioner applied to the Florida Supreme Court for discretionary review, on the grounds of direct and express conflict with Antone v. State, 382 So.2d 1205 (Fla. 1980); cert denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980), which applied to the State of Florida the standard of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). However, the Florida Supreme Court denied jurisdiction on June 19, 1987 (A.1).

V

REASONS FOR GRANTING CERTIORARI

PROPOSITION I

The decision of the trial court, approved by the Third District Court of Appeal, to apply the standard of Hudson v. State, 368 So.2d 899 (Fla. 3d DCA 1979) to the issue of whether alleged errors and omissions contained in affidavits in support of warrants for electronic surveillance is in direct and express conflict with the decision of this Court in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which was applied to the State of Florida in Antone v. State, 382 So.2d 1205 (Fla. 1980); cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980) and is mandated by Article I, Section 12 of the Florida Constitution (1982).

The Florida Third District Court of Appeal has incorrectly applied and, in fact, rejected the standard this Court set for review of alleged errors and

omissions in affidavits in support of warrants for electronic surveillance in the case of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

The order of the trial court properly set forth the standard for reviewing such affidavits pursuant to Hudson v. State, 368 So.2d 899 (Fla. 3d DCA 1979). That is;

> ....Affidavits in support of a wiretap order are invalid if the errors in the affidavit were committed with intent to deceive the magistrate, whether or not the errors were material to showing of probable cause, or if errors were made noninten-

> tionally, but the erroneous statements are material to the establishment of probable cause. Hudson v. State, 368 So.2d 899 (3d DCA 1979).... (A.26).

This is in clear contradiction to the standard set in Franks, as follows;

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be

accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.[8] On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course another issue. (footnote omitted).

Franks v. Delaware, 438 U.S. 154, 171-172 (1978).

The Hudson case had relied on the prior standard of United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); cert. denied, 423 U.S. 844, 96 S.Ct. 79, 46 L.Ed.2d 64 (1975) which was replaced by the Franks standard. United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980).

Further, there can be no question that Federal Law, not State Law was applied. First, the Franks opinion was adopted as the law of Florida in Antone v. State, 382 So.2d 1205 (Fla. 1980); cert. denied, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed. 2d 141 (1980).

Second, the application of Franks is mandanted by the 1982 revision of the Florida Constitution, as follows:

> SECTION 12. **Searches and seizures.** - The right of the people to be secure in their

> persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of his right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution. (emphasis added).

Florida Constitution (1982) art. I, §12.

Therefore, the Third District Court of Appeal of Florida implicity overruled this Court's Franks decision in this case.

VI

CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerned in the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this day of August, 1987 at Tallahasse, Florida.

Respectfully submitted,

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State of Florida

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF FLORIDA,

Petitioner,

vs.

SETH EBER, ROBERT RIZZIERI, CHARLES DELMONICO, SHELDON SPECTOR and BURTON WOLCOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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SUPREME COURT OF FLORIDA
FRIDAY, JUNE 19, 1987

STATE OF FLORIDA,

Petitioner,

v.

SETH EBER, ROBERT RIZZIERI CHARLES DELMONICO, SHELDON SPECTOR, RICHARD SAN ROMAN and BURTON WOLCOFF,

Respondents.

_____/

CASE NO. 70,217

3d DCA Case Nos. 86-65, 86-70, 86-71 86-72 86-75

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).
EHRLICH, Acting C.J. SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

Respondents' Motion to Strike Brief of Petitioner on Jurisdiction is hereby denied.
EHRLICH, Acting C.J. BARKETT, GRIMES and KOGAN, JJ., concur SHAW, J., dissents

A True Copy H
TEST:

Sid J. White
Clerk Supreme Clerk

cc: Hon. Louis J. Spallone, Clerk, Hon. Richard P. Brinker, Clerk, Hon. D. Bruce Levy, Judge, Charles M. Fahlbusch, Esquire, Mel Black, Esquire, Burce Rosenthal, Esquire Craig Stella, Esquire Arthur W. Tifford, Esquire Neal Sonnett, Esquire

By _____
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA THIRD DISTRICT
JANUARY TERM, 1987

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

SETH EBER and ROBERT RIZZIERI, 86-65

Appellees.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

CHARLES DELMONICO 86-70

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

SHELDON SPECTOR, 86-71

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

86-72

RICHARD SAN ROMAN,

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

BURTON WOLCOFF, 86-75

Appellee.

Opinion filed January 20, 1987.

Appeals from a non-final order from the Circuit Court for Dade County, D. Bruce Levy, Judge.

Robert A. Butterworth, Attorney General, and Charles M. Fahlbusch, Assistant Attorney General for appellant.

Mel Black, for appellee Eber; Bennett H. Brummer, Public Defender, and Bruce A. Rosenthal, Assistant Public Defender, for appellee Rizzieri; Black and Furci and Roy E. Black, and Maria

Tinkler Mendez, for appellee Delmonico; Bierman, Sonnett, Shohat and Sale and Benedict P. Kuehne, for appellee Spector; Arthur Tifford, for appellee San Roman; C. Craig Stella (Fort Lauderdale), for appellee Wolcoff.

Before BARKDULL and DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

The trial court's order granting the defendants' consolidated motions to suppress evidence gathered by court authorized electronic surveillance, being amply supported by substantial competent evidence and controlling case law, is affirmed as to all defendants, except Richard San Roman. Unlike the other defendants, San Roman is not an aggrieved person as that term is defined in Section 934.02(9), Florida Statutes (1981),[1] and has no standing to complain

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[1] Section 934.02(9) reads:

(Continued)

of infringements on the constitutional rights of others. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Sarno v. State, 424 So.2d 829 (Fla. 3d DCA 1982), rev. denied, 434 So.2d 888 (Fla. 1983); State v. Ferguson, 411 So.2d 963 (Fla. 3d DCA 1982).

Although the trial court apparently--and correctly--concluded that San Roman was neither a party to any unlawfully intercepted wire or oral communication nor a person against whom such interception wire or oral communication nor a person against whom such interception was directed, it nevertheless suppressed the evidence as to San

---

"'Aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

Roman on the theory that because he was "arrested pursuant to a search warrant, which in turn, grounded its probable cause on information gained from the [unlawful] wiretap, [he] had standing to contest the wiretap order." The case relied upon by the trial court for its ruling, Scheider v. State, 389 So.2d 251 (Fla. 1st DCA), rev. denied, 397 So.2d 779 (Fla. 1980), which involved defendants whose telephone conversations were intercepted during the tap in question, simply does not support the trial court's decision in this regard.

Affirmed in part; reversed in part.

A-8

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 86-65, 86-70,
86-71, 86-72, 86-75

THE STATE OF FLORIDA,	)	
Appellant,	)	MOTION FOR RE-HEARING AND CLARIFI CATION
vs.	)	
SETH EBER, ROBERT RIZIERI, CHARLES DELMONICO, SHELDON SPECTOR, RICHARD SAN ROMAN, and BURTON WOLFF,	)	
Appellees.	)	

The Appellee, **THE STATE OF FLORIDA,** through its undersigned attorneys, pursuant to Rule 9.330 Fla.R.App.P., hereby moves this Court for rehearing and clarification of its order of January 20, 1987 on the following grounds:

1. Although this Court properly found that defendant Richard San Roman did not have standing to contest the validity of the warrants concerned, it overlooked the fact that none of the defendants except Charles Delmonico were "aggrieved persons" under the statute to contest the validity of the "body bug" warrant of August 18, 1982. There is no question that none of the other defendants were named targets of the warrants or were overheard on the bug, clearly removing them from the definition of persons who have standing to contest the warrant under F.S. §934.09 (9)(a).

2. Second, this court overlooked the fact that the trial court applied an incorrect standard in finding that certain errors and omissions in the supporting affidavit precluded a finding

of probable cause. The trial court expressly applied the standard of Hudson v. State, 368 So.2d 899 (Fla. 3d DCA 1979), as shown by its attached opinion, which required only a showing that the errors were either intentional or material. This standard has long since been replaced by the standard of Franks v. Delaware, 438 U.S. 154 (1978), adopted by this state and district in Antone v. State, 382 So.2d 1205 (Fla. 1980); cert. denied, 449 U.S. 913 (1980) and Vetter v. State, 395 So.2d 1199 (Fla. 3d DCA 1981). This standard requires that deliberate falsity or reckless disregard for the truth and materiality be established to even be entitled to a hearing.

3. This court also overlooked the fact that the one (1) omission of the

eleven (11) alleged errors and omissions cited by the trial court which was actually supported by the evidence, that the affiant failed to notify the issuing magistrate that the informant was paid, is completely immaterial to any finding of probable cause. The courts of this state have held that there is no practical difference between a lay informer and a paid informer. State v. Harrington, 307 So.2d 466 (Fla. 2d DCA 1975). Further, admissions against interest, many of which were contained in the statements of the informant concerned, have been held to provide sufficient indicia of an informant's credibility to support the issuance of warrants. State v. Patterson, 309 So.2d 555 (Fla. 2d DCA 1975); See, also, United States v. Harris, 403 U.S. 573 (1971); United

States v. Pate, 451 F.2d 1381 (7th Cir. 1971).

Certainly, there is no question that there was any violation of the standards of Cruz v. State, 465 So.2d 516 (Fla. 1985) or State v. Glosson, 462 So.2d 516 (Fla. 1985) where there was no evidence, whatsoever, that payment to the informant was contingent upon his testimony. State v. Ruiz, 495 So.2d 256 (Fla. 3d DCA 1986); State v. Prieto, 479 So.2d 320 (Fla. 3d DCA 1985).

WHEREFORE, the Appellee, **THE STATE OF FLORIDA**, through its undersigned attorneys, hereby moves this court for rehearing and for clarification of its opinion on the above bases.

Respectfully submitted,

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Attorney General

CHARLES M. FAHLBUSCH
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Miami, Florida 33128
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **MOTION FOR REHEARING AND CLARIFICATION** was furnished by mail to ROY E. BLACK, ESQ., 100 Chopin Plaza, Suite 1300, Miami, Florida 33131, HOWARD LUBEL, ESQ., Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida, 33125, ARTHUR W. TIFFORD, ESQ., 1385 N. W. 15th Street, Miami, Florida 33125, MEL BLACK, ESQ., 3050 Biscayne Blvd. Suite 1002, Miami, Florida 33137, CRAIG STELLA, ESQ., 524 S. Andrews Avenue, Suite 204E, Fort

Lauderdale, Florida 33301, and NEIL SONNETT, ESQ., 200 S.E. 1st Street, Suite 500, Miami, Florida 33131, on this 4th day of February, 1987.

CHARLES M. FAHLBUSCH
Assistant Attorney General

ml

IN THE DISTRICT COURT OF APPEAL OF
FLORIDA THIRD DISTRICT
WEDNESDAY FEBRUARY 25, 1987

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

SETH EBER and ROBERT RIZZIERI, 86-65

Appellees.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

CHARLES DELMONICO 86-70

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

SHELDON SPECTOR, 86-71

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

RICHARD SAN ROMAN, 86-72

Appellee.

THE STATE OF FLORIDA,

Appellant,

vs. CASE NO.

BURTON WOLCOFF, 86-75

Appellee.

Upon consideration, appellant's motion for rehearing and clarification is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By Evelyn A. Hillman
Deputy Clerk

cc: Charles M. Fahlbusch
Roy E. Black
Howard Lubel
Arthur Tifford
Mel Black
Craig Stella
Neil Sonnett

/hb

A-18

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR DADE COUNTY, FLORIDA

CASE NOS. 84-2627, 84-2628
84-2629, 84-2630, 84-2631

STATE OF FLORIDA,

Plaintiff,

vs.

SETH EBER, ROBERT RIZZERI, BURTON WOLCOFF, CHARLES DELMONICO, RICHARD SAN ROMAN & SHELDON SPECTOR,
Defendants.

_____/

ORDER GRANTING MOTIONS TO SUPPRESS EVIDENCE FROM ELECTRONIC SURVEILLANCE

THIS CAUSE came to be heard pursuant to the Defendants' joint motions to suppress evidence gathered by court authorized electronic surveillance pursuant to Chapter 934 of the Florida Statutes. This Court held an evidentiary hearing, lasting three days, from the 18th to the 20th day of June, 1985, and has also reviewed all the numerous

written memoranda submitted by both sides.

Chapter 934 sets up strict requirements with regard to electronic surveillance, which must be adhered to in order to prevent improper governmental easedropping and safeguard the individual's right to privacy. Based on the requirements of Chapter 934, and the following Findings of Fact and Conclusions of Law, this Court must suppress all the evidence of the telephone wiretaps pursuant to the June 10th, and all subsequent applications, and the body plug placed on informant CI-V16, along with all the testimony derived therefrom.

The events leading up to this case originated in March of 1982. On March 10, 1982, the chief investigating

officer and affiant in this case, Metro-Dade Det. Sgt. John Collins, first met with Moshe Perlman, shortly after Perlman was arrested for receiving stolen property. Perlman agreed to cooperate with Sgt. Collins in the investigation of Charles Delmonico, and his associates, who the Miami Beach Police Dept. believed to be involved in the receiving of, and dealing in, stolen jewelry. The Miami Beach Police Department had been investigating this case for some time before deferring to the superior investigative resources of the Organized Crime Bureau of the Metro Dade Police Department.

Perlman was then set up in his own jewelry store on Miami Beach by the Metro Dade Police Department. Based on information the police received from

wiretaps on Perlman's phones, and the easedropping equipment in his store, the police, with Sgt. Collins as the affiant, applied for a court order to place wiretaps on certain phone lines of Charles Delmonico, and other alleged conspirators, to monitor their conversations pertaining to receiving stolen jewelry. This first application was dated June 10, 1982, and was granted by Judge Robert Kaye.

Additionally, the police gathered information by placing a body bug on Robert Distillator, who had been involved with most of the named Defendants. He agreed to work as an information after some of the Defendants' allegedly tried to "strongarm" him to scare him into repaying his debts.

STANDING

The first issue to be determined is whether each of the Defendants has standing to contest the legal sufficiency of these wiretaps and other electronic easedropping in this case. Standing to challenge intercepted communications is governed by §934.09(9)(a), Florida Statutes. Any "aggrieved person," pursuant to §934.02(9), Florida Statutes, is a person, who was a party to any intercepted wire or oral communication, or a person against whom the interception was directed.

Under this standard, the Defendants, Charles Delmonico, Seth Eber and Robert Rizzieri have standing to contest the validity of the wiretapped telephone conversations. Delmonico, Eber and Rizzieri were either named in the

applications for wiretaps and/or were parties to intercepted conversations.

In addition, the Defendants, Sheldon Spector and Burton Wolcoff, have standing to contest the validity of all the wiretapped phone conversations, since both were specifically named in Attachment "A" to the July 9, 1982, application and order. This application, from the information gained from the June 10th and 17th orders, and the information derived from the July 9 order itself, subsequently was used to support the August 11 and 18th orders. The standing of Spector is further strengthened by the fact that according to Sgt. Collins, Spector, despite being unidentified, frequently conversed with Delmonico in the intercepted conversations on the subjects of dealing in

stolen property and loansharking/ extortion.

The standing of the Defendant, Richard San Roman, is a bit more tenuous. But, based on the authority of Schneider v. State, 389 So.2d 251 (Fla. 1 DCA 1980), rev. denied 397 So.2d 779, which held that despite the fact defendants failed to show a proprietary, or possessory interest, in the tapped telephone, defendants who were arrested pursuant to a search warrant, which, in turn, grounded its probable cause on information gained from the wiretap, had standing to contest the wiretap order, this Court finds that the Defendant, San Roman, also has standing to contest the wiretaps at issue here.

Also supporting the standing of San Roman, and the other Defendants, is the

fact the affiants failed to show that other more normal investigative techniques, could not have been successfully used in lieu of wiretaps in the stolen property (jewelry) case. This topic will be discussed further below.

Lastly, all defendants have standing to contest the validity of the placement of an electronic monitoring device (body bug) on the body of informant CI-V16, which turned out to be Distillator since the order, applied for on August 18, 1982, provided for the monitoring of any conversation between DISTILLATOR and DELMONICO and/or any other party that may occur at Delmonico's residence.

PROBABLE CAUSE

Under §934.07, Florida Statutes, authorizations for interceptions for wire or oral communications must be supported by a strong showing of probable cause. Affidavits in support of a wiretap order are invalid if the errors in the affidavit were committed with intent to deceive the magistrate, whether or not the errors were material to showing of probable cause, or if errors were made nonintentionally, but the erroneous statements are material to the establishment of probable cause. Hudson v. State, 368 So.2d 899 (3d DCA 1979). In this case, the affiant made several key omissions and misstatements of facts in his affidavits, which, when added together were certainly material to the establishment of probable cause,

and thus these wiretaps must be suppressed due to a lack of probable cause in support thereof.

The affiant, Sargeant Collins, made numerous material omissions of fact and unsupported conclusions in his affidavits. One example is his account of a telephone conversation between Perlman and Delmonico, where Collins reported that Delmonico told Perlman to say, "Hello, Moshe's Jewelry. This is where we do the stealing and everything," when he answered the phone in Perlman's jewelry store. Collins included this to show Delmonico's disregard for the law, but Collins doesn't fully disclose the surrounding circumstances that existed when Delmonico said this. In fact, Delmonico was joking with Perlman about his glum

manner in answering the phone. Sgt. Collins took these joking words out of context instead of presenting the full picture to Judge Kaye. (See transcript of hearing, pp. 64-70).

Next, when intercepting conversations between Perlman and Delmonico concerning the price they sold goods for, and the amount of profits they earned, Collins concludes in his affidavit that these discussions indicated that stolen goods were being dealt in, without giving any real explanation to support his conclusions and interpretations. (See transcript, pp. 74-81). For example, it appears that Collins has editorialized the use of the word "score" in intercepting the discussions. On examination, Collins admits that a large profit alone would not show

an item was stolen and admits that a large profit alone would not show an item was stolen and admits that some of his conclusions may be unfounded. Collins also concludes that Delmonico indicated he had control over Perlman, while another interpretation may have been that Delmonico was counseling Perlman on effective retail sales techniques. (Tr. p. 79).

Next the affidavits omitted the fact that Distillator, who Wolcoff allegedly extorted money from, is a "junkie and a thief," and that Wolcoff had threatened to call Distillator's probation officer (Tr. pp.127-136). They also omit the fact that Delmonico, Eber and Rizzieri are all laughing and joking when talking about "oiling the guns." (Tr. pp. 136-148). The affiant

further fails to tell the judge that he is using the same facts to support his August 11th application as he used for earlier applications. (See Tr. pp. 149-501).

Sgt. Collins also omits the fact that Delmonico, at one point in a conversation with Eber, turned down a deal to get stolen safe deposit box keys (Tr. p. 167). He also admits that Delmonico told Eber to get a lawyer and go to the State Attorney's Office to file charges against Perlman for bouncing a $10,000 check (Tr. pp. 194-204).

Lastly, Collins failed to disclose to Judge Kaye that he was paying Perlman about $18,000 to cooperate with the police, a fact which seriously questions Perlman's credibility and reliability as

a confidential informant (Tr. pp. 211-214).

When taken together, these omissions and unfounded conclusions were material and essential to the finding of probable cause. The judge should have been presented with all the facts in the application and affidavits and been allowed to draw his own conclusions.

Since the court rules that all of the applications, including the original of June 10, 1982, standing alone lack probable cause, it is unnecessary to determine whether the subsequent applications could have been validated by "tacking" them onto the original June 10th application. Most likely, they could not have been so validated. See Bagley v. State, 397 So.2d 1036 (5 DCA 1981).

NECESSITY

In addition to probable cause, there is an exhaustion requirement under §934.09(1)(c) that requires an application for a wiretap order to include a complete statement as to whether other investigative techniques have been tried and/or why they reasonably appear to be unlikely to succeed if tried, or to be too dangerous. See State v. Weedon, 425 So.2d 125 (4 DCA 1982). In this case, the affiant failed to satisfy this procedural exhaustion requirement in the August 18 application. Sgt. Collins failed to state other investigative techniques that could have been used (See Tr. pp. 188-194).

This exhaustion requirement is substantive, as well as procedural. The judge must make a determination that

normal investigative techniques have been tried and failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous §934.09(3)(c). In this case, the affiants have both failed to prove that prior normal investigative techniques they used have failed, and that the future use of more normal investigative techniques would fail. This ground, in and of itself, requires suppression.

Even without the wiretaps, the police gained extensive information on the alleged stolen property activities of the Defendants. Moshe Perlman cooperated fully with the police. He let them set him up in his own jewelry store for the the sole purpose of gathering evidence against Delmonico. Perlman consented to wear body bugs,

have electronic easedropping equipment placed in the store, and to have the phone in his jewelry store wiretapped. The police gathered a great deal of evidence from Perlman's cooperation (See Tr. pp. 215-227).

Further, the Miami Beach Police had extensive surveillance of Delmonico for a long time as did the OCB at a later time. During the period of the wiretaps, the police accumulated eighty (80) pages of surveillance reports (see Tr. pp. 216).

In this case, there was simply no need for a wiretap. As was established during the hearing on the Motion to Suppress, the State's investigation of the alleged stolen property organization was progressing successfully. The real motivation of the State was to conduct

intelligence gathering with regards to Defendant, Delmonico, and his suspected underworld connections. As of May, 1982, the State had ample evidence to arrest and prosecute those individuals, who were involved in the alleged stolen property ring.

The State has failed to show why continued and more extensive surveillance of Delmonico would be unsuccessful and have thus failed to prove they couldn't have made a case by using other, normal investigative techniques without resorting to court ordered wiretaps. They have thus failed to meet the necessity requirements of §934.09.

THE BODY BUG ISSUE

Lastly, the evidence of the body bug placed on the informant, Distil-

lator, which was used to listen to conversations in Delmonico's house, and the testimony derived therefrom, must be suppressed. Although there was a signed order, dated August 18, 1982, authorizing the body bug, the application contained several defects in that it was not signed by the elected State Attorney, was silent regarding alternative investigative techniques, and did not provide for automatic termination. See §934.09 Florida Statutes. This evidence thus must be suppressed under the authority of Sarmiento v. State, 397 So.2d 643 (Fla. 1981), and Article I, Section 12, of the Florida Constitution. The constitutional amendment to Article I, Sec. 12 of the Florida Constitution (approved in 1983) cannot be applied retroactively. State v.

Lavazzoli, 434 So.2d 321, 323 (Fla. 1983).

In conclusion, the Court finds that it must suppress all evidence of all electronic surveillance pursuant to the applications of June 10, 1982, and all subsequent applications in this case, as well as all testimony derived from such evidence. When taken in its totality, the police did not adhere to the strict requirements of Ch. 934 in this investigation. They failed to demonstrate sufficient probable cause and necessity to justify the intrusive use of wiretaps in the stolen property investigation which is at issue here.

Perhaps he greatest intrusion to a citizen's constitutionally protected right to privacy is the interception of his private lives of our citizens.

In light of the about Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED that the Motions to Suppress are hereby granted.

DONE AND ORDERED at Miami, Florida, this 20 day of December, 1985.

D.BRUCE LEVY
CIRCUIT COURT JUDGE

SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-277

in the

Supreme Court

of the

United States

OCTOBER TERM 1987

STATE OF FLORIDA,

Petitioner,

vs.

SETH EBER, ROBERT RIZZIERI, CHARLES DELMONICO, SHELDON SPECTOR, and BURTON WOLCOFF,

Respondents.

On Petition For A Writ Of Certiorari To The Florida Third District Court Of Appeal

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari is appropriate where the State appellate court does not decide a federal question but, instead, merely approves, in general terms, a trial judge's decision on independent State law grounds, only one of which is questioned by Petitioner?

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On Petition For A Writ Of Certiorari To The Florida Third District Court Of Appeal

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion below is reported as *State v. Eber*, 502 So.2d 32 (Fla. 3d DCA), *rev. denied*, ____ So.2d ____ (Fla. 1987), and is reproduced in Petitioner's Appendix at A1-A7.

JURISDICTION

The judgment of the Florida appellate court was entered on January 20, 1987. That court denied rehearing on February 25, 1987. The Florida Supreme Court denied discretionary review on June 19, 1987 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on August 14, 1987. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1257(3) and Supreme Court Rule 17.1(c).

STATEMENT OF THE CASE

On February 2, 1984, the State of Florida charged, in separate charging documents, all Respondents with violations of the Florida RICO, extortion, kidnapping, theft, and dealing in stolen property statutes. The cases were consolidated for purposes of pretrial proceedings. The Respondents jointly filed a motion to suppress evidence derived from electronic interceptions. That motion raised a number of independent grounds for suppression of the evidence, including the absence of probable cause under Florida's Security of Communications Act, the inclusion of material misrepresentations and omissions in the supporting affidavit, the lack of necessity, and the failure to exhaust traditional investigative techniques.[1]

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[1]Petitioner incorrectly states in its Brief on Jurisdiction that "[t]he primary ground for the motion was the alleged errors and omissions contained in the affidavits . . ." (Pet. Brief at 6). The motion to suppress raised a number of equally compelling claims, four of which were found by the trial court to warrant suppression. The appellate court affirmed the trial court's decision.

The suppression issues were presented during a three-day evidentiary hearing, following which the trial judge issued an order suppressing the evidence gathered from electronic surveillance, including all evidence obtained from telephone interceptions and a body bug. The suppression order included findings of fact and conclusions of law, all based on the application of substantive Florida law and the Florida wiretap statute. The order concluded that suppression was mandatory for four independent reasons: absence of necessity for the electronic interception, a lack of exhaustion of traditional investigative techniques, the inclusion of material misrepresentations and omissions in the supporting affidavit, and a lack of probable cause.

The State of Florida appealed the suppression order. The Florida Third District Court of Appeal affirmed the order granting suppression of the evidence as to all Respondents except San Roman.[2] *State v. Eber*, 502 So.2d 32 (Fla. 3d DCA 1987). The Third District opinion concluded that the "trial court's order granting the defendants' consolidated motions to suppress, being amply supported by substantial competent evidence and controlling case law, is affirmed as to all defendants except Richard San Roman." 502 So.2d at 33. The court concluded that San Roman was not an aggrieved person to the electronic surveillance. Other than the "standing" question affecting San Roman, the Third District Court of Appeal did not isolate any legal issues, approve any specific analysis of the trial court, or apply any of the legal authority cited by the trial judge.

The State of Florida applied to the Florida Supreme

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[2]San Roman is not a party to this certiorari proceeding.

Court for a grant of discretionary review, claiming that the appellate decision conflicted with a prior decision of the Florida Supreme Court with regard to the single issue of the inclusion of material misrepresentations and omissions. The Florida Supreme Court denied discretionary review on June 19, 1987.

ARGUMENT

Petitioner contends that the decision of the Florida Third District Court of Appeal conflicts with the decision of this court in *Franks v. Delaware*, 438 U.S. 154 (1978). It is important to note at the outset, however, that Petitioner does not suggest that the Florida Third District directly addressed this Court's *Franks* opinion or that it even discussed the application of *Franks* to the case under review. Instead, Petitioner claims only that the Third District must have ruled contrary to *Franks* because one of the underlying, independent grounds for the suppression order was the presence of material misrepresentations and omissions in the affidavit supporting the electronic interception warrants. Petitioner's argument is plainly meritless.

The certiorari petition essentially asks this Court to look behind the decision of the State appellate court and speculate as to the reasons for its ruling. That is not consistent with Supreme Court Rule 17.1(c), upon which Petitioner grounds its certiorari request. That Rule provides that the discretionary grant of certiorari should be evaluated in light of the following considerations:

> When a state court or a federal court of appeals has decided an important question of federal

> law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

In its opinion, the Florida appellate court did not even purport to discuss the federal rule cited by Petitioner, and the opinion certainly does not conflict with any decision of this Court. This is evidenced by the fact that the Third District reviewed a suppression order bottomed on four independent grounds. The appellate court affirmed suppression, and stated, in general terms that the trial court's ruling was "amply supported by substantial competent evidence and controlling case law. . ." 502 So.2d at 33. Three of the reasons for suppression relied upon by the trial court are not questioned by Petitioner and are impliedly conceded to be correct. Thus, its request that this Court predicate review on one issue which was not plainly decided by the state appellate court should be rejected.[3]

This jurisdictional consideration, moreover, is not satisfied when a state appellate court has an adequate nonfederal ground to support its decision. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983). That is precisely what has occurred in the present case. The Florida appellate court reviewed a state wiretap order which was authorized by a state judge under Florida's Security

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[3]Justice Brennan articulated these jurisdictional concerns in *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

of Communications Act.[4] The trial judge applied Florida law in concluding that suppression was required. When the case was reviewed by the Third District, the case hinged on an application and interpretation of Florida law. Thus, since a review of the appellate court decision shows an independent and adequate state substantive ground, this Court should decline jurisdiction. *See, e.g., Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164-165 (1917).[5]

Petitioner's contention that this case raises a Fourth Amendment issue is not supported by the record of proceedings in the Florida courts, where the case involved an interpretation of state statutes—Florida's Security of Communications Act—and an application of state privacy interests. A fundamental rule of judicial restraint is that prior to reaching any constitutional

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[4]Chapter 933, Florida Statutes. State law can impose more rigid requirements than federal law. *See United States v. Domme*, 753 F.2d 950, 955 (11th Cir. 1985). In the case of Florida seizures occurring before January 4, 1983, Florida provided a higher standard of protection from governmental intrusion than that afforded by the United States Constitution. *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla. 1983); *State v. Williams*, 443 So.2d 952 (Fla. 1983). The warrants in this case were issued in June, July and August of 1982, prior to the Florida Constitutional Amendment relied upon by Petitioner. This constitutional amendment was held to have only prospective application. *State v. Lavazzoli.*

[5]"If a state court's decision can rest on an independent decision involving state law, then regardless of the correctness of the state court's decision on an issue of federal law, the Supreme Court does not have jurisdiction, because the validity of the statute under the constitution of the United States is not 'drawn in question,' for purposes of 28 U.S.C. §1257(2)." *Beltran v. State of California*, 617 F.Supp. 948, 954 (S.D. Cal. 1985), citing to C. Wright & A. Miller, Federal Practice & Procedure, §§4019, 4029.

questions, courts should consider non-constitutional grounds for decision. "[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992, 2998 (1985); *Gulf Oil v. Bergance*, 452 U.S. 89, 99 (1981). Moreover, as recognized in *Int'l Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 1910 (1986), this Court has no authority to review state determinations of purely state law, nor may it review federal issues that can have no affect on a state court's judgment.

This Court should not consider this case since jurisdiction is premised on a constitutional question raised by Petitioner where there is no reason to conclude that the state appellate court considered or reached that constitutional question. In this respect, Respondents take strong issue with Petitioner's unsupported and erroneous claim that "there can be no question that Federal Law, not State Law was applied." (Pet. Brief at 13). As the previous discussion illustrates, the real question is whether the appellate court had any reason to address the merits of Petitioner's argument. It is apparent that it did not.

Close scrutiny of Petitioner's argument reveals that the federal question asserted—conflict with *Franks v. Delaware*—is not a substantial one for which this Court's review is necessary or appropriate. First, Petitioner's tortured construction of the trial court's conclusion on the material misrepresentation issue overlooks that court's finding that the electronic interception affidavits

lacked probable cause.[6] (Pet. App. A31). That is precisely the analysis called for in *Franks*: to determine whether the affidavit, after excising the unquestionably false statements and omissions, independently establishes probable cause. 438 U.S. at 156-157, 98 S.Ct at 2676. The trial court carefully applied that rule, and made a specific finding, pursuant to the standard articulated in *Franks,* that the omissions and misstatements were material. The appellate court viewed the trial court order from that correct legal perspective. There is nothing in the appellate court decision which can be construed as rejecting the *Franks* standard. Thus, there is no basis for a claim of conflict.

Petitioner's conflict jurisdiction argument rests on a misinterpretation of the Third District opinion and a misunderstanding of this Court's jurisdiction. The trial court correctly concluded that suppression was required on the basis of four independent reasons: the wiretap was unnecessary, police did not exhaust available investigative methods, the affidavits as a whole lacked probable cause, and there were material misrepresentations and omissions. The appellate court merely affirmed the trial court order on the ground that it was "amply supported by substantial competent evidence and controlling case law." Therefore, resolution of the appeal did not rest solely on the material misrepresentation question so vigorously

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[6]Petitioner does not claim any error in the determination that material misrepresentations and omissions infected the supporting affidavit. This Court, moreover, should not review the factual findings of the lower tribunals. *See Miller v. Fenton*, 474 U.S. 104 (1985); *United States v. Doe*, 465 U.S. 605, 613-614 (1984).

pursued by Petitioner.[7] As these independent, unquestioned grounds are broad enough to support the decision of the appellate court, certiorari review would "amount to no more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This court should decline jurisdiction.

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[7]The crux of Petitioner's argument is that the trial court cited the case of *Hudson v. State*, 368 So.2d 899 (Fla. 3d DCA 1979), in discussing the standard for evaluating misstatements and omissions. Notwithstanding the fact that the trial court cited *Hudson v. State* in its order, it still found that the misrepresentations and omissions were material and that the remainder of the affidavits did not establish probable cause, which is precisely what is required under *Franks*. Thus, the trial court's reference to *Hudson v. State* was irrelevant, because its decision did not turn on whether the misrepresentations were intentional, but rather on whether they were material.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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